

In The United States District Court  
For The District Of Delaware

Kyle Roane,  
Petitioner,

Civ. Act. No. 05-654-JJA

V.

THOMAS CARROLL,  
Warden  
Respondent.



Petitioner's Reply Brief

Kyle Roane  
Movant  
DELAWARE CORRECTIONAL CENTER  
1181 Paddock Road.  
SMYRNA, DEL. 19977.

DATE: 1-3-06

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Ground I. Counsel failed to investigate victim's prior inconsistent testimony. Counsel failed to bring inconsistencies to the attention of the jury. Victim's statements made at trial versus statements made to officer's interview.

First defendant would like to apologize for his ignorance of terms used in this charge, defendant meant statement rather than testimony and when using the term victim's defendant was refer to victim's as in Plural and not singular as in Mr. Casula and Mr. White.

Technically when defendant referred to counsel not bringing inconsistencies to attention of the jury, you can find that Mr. Casula and Mr. White gave inconsistent testimonies. Mr. Casula at trial, Mr. White statement at interview with officer versus testimony at trial. Counsel failed to bring Mr. White inconsistent statement to attention of jury.

First Prong: Counsel failed to bring inconsistencies to attention of jury, defendant's Discovery should of been used for defendant's evidence which was evaluated as factual assertion. Failure to bring inconsistencies to light, defendant wasn't able to bring inconsistencies on Appeal. Counsel representation fell below an objective standard of reasonableness, Court of Appeal conclude strategic choices made after thorough investigation (not explore) of law and facts relevant to plausible option are virtually unchallenged.

Second Prong: If counsel would of established that defendant was not in possession of the "Blue jeans", the element of Robbery 1<sup>st</sup> wouldn't of existed. (See Exhibit B) Mr. White stated as a result of the struggle all the unpaid items fell from defendant's jacket, Blue jeans included. With this fact it goes without say that the outcome would of been different.

Exhibit A

(Exhibit A)

Exhibit B

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1 economic benefit of it. The term "force" or "use of  
2 force" as used in the definition of robbery second  
3 degree, has no technical meaning peculiar to law and  
4 must be given its ordinary meaning. "Force"  
5 generally means the capacity or power to persuade,  
6 convince, restrain or coerce and does not necessarily  
7 imply physical violence. The phrase "threatens the  
8 immediate use of force upon another person," unquote,  
9 would mean a show of power or strength sufficient to  
10 compel the giving up of property. "Intentionally"  
11 means that it was the defendant's conscious object or  
12 purpose to act in the manner alleged.

13 If, after considering all of the evidence,  
14 you find that the State has established beyond a  
15 reasonable doubt that the defendant acted in such a  
16 manner as to satisfy all of the elements which I have  
17 just stated, at or about the date and place stated in  
18 the indictment, you should find the defendant guilty  
19 of robbery in the first degree. If you do not so  
20 find, or if you have a reasonable doubt as to any  
21 element of this offense, you must find the defendant  
22 not guilty of Robbery First Degree.

23 In such a case or in the event that you are

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1 at an impasse and you are unable to reach a unanimous  
2 verdict on the charge of Robbery First Degree, then  
3 you may go on to consider the lesser included  
4 offenses of Theft Misdemeanor and Assault Third  
5 Degree.

6 Delaware law defines the offense of Theft.  
7 in pertinent part, as follows:

8 A person is guilty of theft when the person  
9 takes property of another person intending to deprive  
10 that person of it or appropriate it.

11 Therefore, in order to find the defendant  
12 guilty of Theft, you must find that all of the  
13 following elements have been established beyond a  
14 reasonable doubt:

15 One, the defendant took property of another  
16 person, in this case, the Dollar Store;

17 And, two, the defendant intended to deprive  
18 the person of the property or to appropriate the  
19 property;

20 And, three, the property was valued at less  
21 than \$1000.

22 "Intentionally" means that it was the  
23 conscious object or purpose of the defendant to

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1 deprive the person of the property or to appropriate  
2 the property. "Property of another" means property  
3 in which any person other than the defendant has an  
4 interest which the defendant does not have permission  
5 to take. "Appropriate" means to exercise control  
6 over property of another permanently or for as  
7 extended a period of time or under such conditions as  
8 to acquire a major portion of its economic value or  
9 benefit. "Deprive" means to withhold property of  
10 another person permanently or for so extended a  
11 period of time or under such circumstances as to  
12 withhold a major portion of its economic value or  
13 benefit.

14 If, after considering all of the evidence,  
15 you find that the State has established beyond a  
16 reasonable doubt that the defendant acted in such a  
17 manner as to satisfy all of the elements that I have  
18 just stated, at or about the date and place stated in  
19 the indictment, you should find the defendant guilty  
20 of theft. If you do not so find, or if you have a  
21 reasonable doubt as to any element of this offense,  
22 you must find the defendant not guilty of Theft  
23 Misdemeanor.

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1 Delaware law defines the offense of Assault  
2 Third Degree, in pertinent part, as follows:

3 A person is guilty of assault in the third  
4 degree when:

5 One, the person intentionally causes  
6 physical injury to another person.

7 In order to find the defendant guilty of  
8 assault in the third degree, you must find that all  
9 of the following elements have been established  
10 beyond a reasonable doubt:

11 One, the defendant caused physical injury to  
12 James Casula;

13 And, two, the defendant acted intentionally.

14 "Intentionally" means that it was the  
15 defendant's conscious object or purpose to cause  
16 physical injury to another person. "Physical injury"  
17 means the impairment of physical condition or  
18 substantial pain.

19 If, after considering all of the evidence,  
20 you find that the State has established beyond a  
21 reasonable doubt that the defendant acted in such a  
22 manner as to satisfy all of the elements which I have  
23 just stated, at or about the date and place stated in

A 40  
Exhibit B

I.

Ineffective Assistance Of Counsel  
 Counsel failed to investigate prior  
 inconsistent statement, counsel failed to  
 bring inconsistencies to attention of jury.  
 Statement made at police officer's initial  
 interview versus testimony given at trial.

### Argument

State's conduct so undermined the proper  
 functioning of adversarial process that the  
 appeal process could not be relied on as having  
 produced a just result.

### Cause for Procedural Default

Upon a review of Defendant's initial Post  
 Conviction Motion you could come to the conclusion  
 that the claim before you today is slightly different  
 from the claim then. The claim consisted of some  
 erroneous terms in reference to Defendant's  
 actual intent. The claim asserted was as followed:

Ineffective Assistance Of Counsel  
 Counsel failed to investigate Victim's prior  
 inconsistent statement, counsel failed to bring  
 inconsistencies to attention of jury. Victim's  
 statement made at police officer's initial interview  
 versus testimony given at trial.

After a review of the State's Affidavit,  
 and the review of

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counsel's Affidavit of the reply to Defendant's brief it came to light that Defendant's claim was nexus to meritless and frivolous because of the way the Defendant claim was presented. Counsel Averred that no prior testimony existed with which to impeach or otherwise confront the victim. So in return Defendant submitted a reply brief in hopes to clarify his claim. [See Exhibit A]

The cause for Defendant's claim not being fully exploited rest in the hands of the Superior Court! Defendant did in fact attempt to clarify his claim, the state court unfortunately only acknowledged partial of Defendant's clarity. State Court acknowledges that Defendant meant statement instead of testimony, but it failed to produce what brings us to this point. Also asserted in Defendant's reply brief is his clarity on the term victim's, Defendant states when he was referring to the term victim's it was plural and not singular, referring to Mr. Casula as well as "Mr. White". For this fact alone this is the cause of the current impasse that's before us now. It was incumbent for the state to interpretate a claim in which it defines as "vague" and come to a conclusion that defendant failed to demonstrate prejudice without full understanding.

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In relevance to the MISCARriage Of Justice, Defendant has Always MAINTAINED he never committed the crime of robbery in which he was charged. He contends that if counsel would of investigated and developed mitigating evidence that supported the defenses theory the offense for Robbery first degree would of lacked sufficient evidence. It is important to note that prejudice questions under Strickland is whether All of counsel's unprofessional error's combined undermined the confidence in the result of the outcome. Essentially Defendant claims rest on the ineffectiveness of counsel's failed duties. The evidence asserted in the Defendant's brief speaks volume of counsel's inadequacies, counsel's overall performance prejudiced defenses chances for any type of acquittal or relief. If in fact the state's claim that the Dixon Instruction had no validity is true, it solidifies another chapter of a ongoing failure to investigate and produce just results. The fact's are "Clear", and like the tomato sauce Prego they're All in there. It's Affirmative that the proof is not in the "Pudding", it's in the Tasting.

II.

Ineffective Assistance Of Counsel  
 Counsel failed to object to Defendant being sentenced under a fraudulent predicate felony.

### Argument

Counsel failed to object to a fraudulent predicate felony in which the State charged in it's 2003 Motion to declare Defendant A Habitual Offender.

The State claims that no prejudice occurred during the proceedings of the Defendant's A Habitual Offender hearing is meritless.

In the State's 2003 Motion to declare Defendant A Habitual Offender was a fraudulent felony of Poss  $\frac{w}{t}$  to deliver cocaine. The determination by trial court that Defendant is A Habitual Offender must be supported by substantial evidence in Specific Record and free from "Legal Error" and Abuse of discretion.

Hindsight is 50/50, and to eliminate the distorting effects of hindsight we must evaluate the facts set forth in the motion at hand. To allow the State the opportunity to rescue it's mistake after wouldn't be fair. If for no other reason, the State is obligated to acceptance of their own responsibility. It's ambiguous for the State to say that there was ample

evidence in the state court record at the time of sentencing to support the Superior Court's findings, and the counsel's inadvertence did not have a impact on the habitual offender sentence.

And it was also ambiguous in saying the hearing to establish habitual offender status was not necessary after the issue, because the fact is they did and the outcome of the proceedings were erroneous.

Nevertheless, we can not "assume" that the state was aware of defendant's prior habitual status, because truly if that was a "fact" we would not be arguing the inadequacies.

Counsel conduct so undermined proper functioning of adversarial process that counsel duty can not be relied on as having produced a just result.